IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	**Subcase Nos. 34-00012, 34-00013, 34-02507 and 34-10873**
Case No. 39576	)	
	)	**MEMORANDUM DECISION AND ORDER ON CHALLENGE**

Challenge to ***Order Granting Payette and Little Salmon's Motion to Alter or Amend; Amended Order Granting Walker's Motion to Dismiss and Denying BLRWUA's Motion to Alter or Amend.***

Appearances:

William Hollifield of Hollifield and Bevan, P.A., Twin Falls, attorney for Big Lost River Water Users Association (BLRWUA).

Kent W. Foster of Holden, Kidwell, Hahn & Crapo, P.L.L.C., Idaho Falls, attorney for Big Lost River Irrigation District (BLRID).

Randall C. Budge of Racine, Olson, Nye, Budge & Bailey, Chartered, attorney for Claimant, Young Harvey Walker.

Ray W. Rigby and Gregory W. Moeller of Rigby, Thatcher, Andrus, Rigby, Kam & Moeller, Chartered, Rexburg, attorneys for Sunset Trust Organization and Arthur W. Quist.

Scott L. Campbell and Angela D. Schaer of Elam & Burke, P.A., Boise, attorneys for Payette River Water Users Association, Inc. (PRWUA) and Little Salmon River Water Users, Inc. (LSRWU).

I.

BLRWUA'S CHALLENGE

This is a Challenge by the Big Lost River Water Users Association to Special Master Bilyeu's ***Order Granting Payette and Little Salmon's Motion to Alter or Amend; Amended Order Granting Walker's Motion to Dismiss and Denying BLRWUA's Motion to Alter or Amend*** filed August 28, 1998.

II.

FACTS AND PROCEDURAL BACKGROUND

According to its *Memorandum on Challenge*, lodged October 19, 1998, the Big Lost River Water Users Association (BLRWUA) is an organization composed of individuals who each have filed individual claims in the SRBA and are members of the Big Lost River Irrigation District. Also according to its brief, BLRWUA has been an interested party and has participated in the SRBA since 1992.

The Big Lost River Irrigation District (BLRID) is an irrigation district within Reporting Area 1 (Basin 34). A history of BLRID is set forth in *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 79 (1993). For this reason, it will not be repeated herein.

The background of these subcases is unique because the dispute was originally tried before the District Court of the Seventh Judicial District and appealed to the Idaho Supreme Court, which held that the District Court lacked jurisdiction, stating that only the SRBA has jurisdiction. *Walker v. Big Lost River Irr. Dist.*, 124 Idaho 78, 79 (1993). Subsequently, these claims were properly brought before the SRBA.

Succinctly stated, the heart of these disputes is the propriety of the delivery of dedicated, non-surplus storage waters of BLRID to lands outside of the district boundaries.

Originally, Young Harvey Walker (hereinafter Walker) and Sunset Trust claimed that they were the owners of water rights 34-10943, 34-10944, 34-10945, 34-10946 (Walker's claims), 34-12431 and 34-12432 (Sunset Trust's claims) which encompassed the 634.5 acres at issue in these claims. BLRID likewise claimed ownership of these water rights by claim numbers 34-00012, 34-00013, 34-02507 and 34-10873. The Director of the Idaho Department of Water Resources (IDWR) had recommended the water rights in these subcases as being owned by BLRID with the place of use on lands only within the boundaries of BLRID.

Alternatively, Walker and Sunset Trust objected to these water rights claimed by BLRID, arguing that the subject 634.5 acres should be included in the place of use for the water rights owned by BLRID. The claims filed by Walker and Sunset Trust and their *Objections* to these water rights placed the additional 634.5 acres at issue at the outset of the SRBA.

Jay V. Jensen (hereinafter Jensen) also owns 267 acres outside the boundaries of BLRID which are at issue in the SRBA. Jensen did not file a separate claim for water rights on this additional acreage, but did file late *Objections* to BLRID's claimed rights seeking to include the additional acreage. Jensen argued that these water rights of BLRID should have a place of use which included Jensen's lands outside the boundaries of BLRID.

Walker and BLRID filed motions for summary judgment. The Special Master issued an order on summary judgment, dated August 18, 1997, ruling that Walker did not own the water rights, but that BLRID was the owner. The Special Master also held that "any contract to deliver water outside District boundaries would be *ultra vires,"* and that there was still an issue of material fact as to whether BLRID was estopped from refusing to deliver water to the lands of Walker, Sunset Trust, and Jensen outside the boundaries of BLRID. *See Order on Summary Judgment* filed August 18, 1997. See also the briefs filed in April and May of 1997 by counsel for both BLRID and Walker supporting and opposing summary judgment. Between the Master's ***Order on Summary Judgment*** and these briefs, these claims are explained in detail.

Following the summary judgment order, these subcases were consolidated and scheduled for trial before the Special Master on the estoppel issue. BLRID was and had been represented in

these matters by attorney Roger Ling. Shortly before the trial, Mr. Ling's employment was terminated by the Board of BLRID and he was replaced by attorney Kent Foster.

According to BLRWUA's *Memorandum on Challenge*, Mr. Foster had previously represented Jensen in these subcases and represented many other individuals claiming water rights with points of diversion within BLRID boundaries for places of use outside the boundaries of BLRID. For example, it is stated that Mr. Foster currently represents Don Aikele and Todd Perkes, both Directors of BLRID and both claiming water rights with points of diversion within BLRID but with places of use outside BLRID boundaries. *See Memorandum on Challenge*, p. 3.

Shortly after Mr. Foster was employed by BLRID, a Water Rights Agreement was negotiated, with the participation of Mr. Foster. The agreement was executed by some of the parties to the subcases, including BLRID on or about March 3, 1998. *See* Water Rights Agreement, Exhibit C to *Memorandum in Support of Notice of Challenge*, lodged October 19, 1998. The Water Rights Agreement (paragraph 3, page 4, Exhibit C) provides that BLRID shall "continue permanently the delivery" of water to Walker's lands outside BLRID boundaries.

Subsequently, a *Standard Form 5* was executed by the parties to the subcase putting the lands of Walker, Jensen, and Sunset Trust lying outside of BLRID within the place of use of the water rights owned by BLRID. *See* Exhibit D attached to *Memorandum in Support of Notice of Challenge* lodged October 19, 1998.

On March 25, 1998, Special Master Bilyeu issued the ***Special Master's Report and Recommendation, Findings of Fact and Conclusions of Law***. In her recommendation, the Special Master briefly described the procedural history of the subcases and then made the finding that the additional acreage lying outside BLRID owned by Walker, Sunset Trust and Jensen would be included in the place of use of the water rights owned by BLRID. Apparently, the sole factual finding upon which the Special Master based her recommendation was that the parties to the subcases had executed a *Standard Form 5* which included these lands within the place of use. In the ***Recommendation***, the Special Master states that the primary dispute was whether BLRID could deliver its water outside BLRID boundaries. The Special Master then makes the recommendation

solely based upon a contractual agreement which she had previously held BLRID could not do because it was an *ultra vires* act.

Upon learning of the March 3, 1998 Water Rights Agreement and the *Special Master's Recommendation.* BLRWUA filed a *Motion to Alter or Amend* objecting to the place of use element. This motion was denied by the Special Master on June 18, 1998, holding that based upon *Fort Hall Water Users Assn.. v. U.S.*, 129 Idaho 29, 921 P.2d 739 (1996), BLRWUA did not have standing to bring the motion. Subsequently, the Special Master reversed her recommendation holding that BLRWUA did have standing, but dismissed its motion essentially for the stated reason that the BLRWUA failed to timely participate, and that to allow participation at this point in time would be "unfair."

In 1994, BLRWUA had filed a *Notice of Intent to Participate in Hearing for Preliminary Injunction and Writ of Mandate. See* Exhibits F and G attached to the *Memorandum in Support of Notice of Challenge,* lodged October 19, 1998. The SRBA Court denied the participation because the members of BLRWUA were also members of BLRID which was represented by Roger Ling. *See* Transcript of Young Harvey Walker's *Motion for Preliminary Injunction and Writ of Mandate*, BLRWUA's *Motion to Participate*, April 11, 1994.

The Payette River Water Users Association, Inc. (PRWUA) and the Little Salmon River Water Users, Inc. (LSRWU) (collectively the Associations) became involved in this matter after they discovered that the Special Master had issued her ***Report and Recommendation of Master*** on July 2, 1998 (Amended Report), and an ***Order Denying Walker's Motion to Dismiss; and Denying BLRWUA's Motion to Alter or Amend*** on June 18, 1998 (June 18 Order). The following excerpt from the *June 18 Order* is stated by the Associations in their *Response Brief on Challenge* to provide the reason for PRWUA's and LSRWU's participation in this matter:

> This Special Master has previously ruled from the bench that a non-claimant lacked standing to bring a *Motion to File Late Objection* where he had not filed claims in the SRBA. *Order Denying Richard Kendall's Motion to File Late Objection* (July 25, 1997) (Subcases 34-00567, 34-00568). The court is unaware of any reason why it should not apply the same rule here, expressly extending the holdings in *Fort Hall.* Accordingly, this Special Master holds that BLRWUA does not have standing to file a *Motion to Alter or Amend* because it is not a claimant in the SRBA within

the meaning of I.C. § 42-1401A(1). Because BLRWUA lacks standing in these cases, this decision does not reach the issues of the timeliness of BLRWUA's *Motion to Alter or Amend* or the validity of BLRWUA's intervention.

June 18 Order, p. 4 (underscore added by the Associations in their reply brief).

The holding's ramifications for PRWUA and LSRWU caused them concern, namely: If the Special Master's decision stood in these subcases, it was almost certain that their SRBA associational standing would be challenged and possibly defeated in other subcases in which they claim to have a direct interest. Therefore, as soon as PRWUA and LSRWU received notice of the Special Master's decision via the docket sheet procedure, they filed a *Motion to Alter or Amend.*

III.

ISSUES RAISED ON CHALLENGE

The only *Notice of Challenge* filed in this matter was filed by BLRWUA on September 11, 1998. No other party filed a *Notice of Challenge*.

Those issues were stated as follows:

1. Did the Special Master err in ruling that issues of "fairness" preclude BLRWUA from filing its *Motion to Alter or Amend* when this Court's Administrative Order 1, Rule 13(a) allows "[a]ny party to the adjudication not already a party to the subcase" to file such a motion?

2. Did the Special Master err in attributing fault to BLRWUA in delaying the resolution of the case when, in fact, the delay was caused by the Special Master's erroneous ruling dismissing BLRWUA from the case shortly after its *Motion to Alter or Amend* was filed?

3. Did the Special Master err in ruling that the "history" of the subcases at issue was cause to preclude BLRWUA from filing a *Motion to Alter or Amend,* which this Court's Administrative Order allows it to file?

4. Did the Special Master err in dismissing BLRWUA's *Motion to Alter or Amend* without any citation to authority, but only a vague reference to equitable issues such as "fairness" or the "history" of the cases?

5. Did the Special Master err in granting Walker's and Sunset Trust's *Motion to Dismiss* after she previously ruled that actions taken by the Directors of BLRID were *ultra vires* in granting or delivering water outside the district?

6. Did the Special Master err in her factual conclusion that is was appropriate to deliver water outside the district boundaries?

7. Did the Special Master's decision dismissing BLRWUA from this proceeding in March 1998 prejudice the rights of the Association by allowing members of the irrigation district to control issues related to the Association without appropriate representation of the Association's interests?

8. Did the Special Master's decision dismissing BLRWUA from the proceeding, which she later reversed on August 28, 1998, prejudice the Association by not allowing the Association to participate as allowed and contemplated by Rule 13(a) of this Court's Administrative Order 1?

IV.

ASSOCIATIONAL STANDING

One issue is whether associational standing is properly before this Court in this Challenge. The eight issues raised on the Challenge of BLRWUA are stated in the preceding section of this Order. PRWUA and LSRWU argue that under ***SRBA Administrative Order 1, Rules of Procedure*** (AO-1), Rule 13(c), associational standing was not specifically raised as one of the issues and, therefore, is not before the Court.

Despite the language of AO-1, Rule 13(c), in its *Opening Brief,* in which Sunset Trust concurred, BLRID attempted to broaden the issues to be considered on challenge adding, *inter alia:*

> As we understand it, BLRID, Walker, Sunset and Jensen continued to agree to the settlement they worked out about a year ago, and they agree that:
>
> . . . .
>
> 3. PRWUA and LSRWU had no standing to challenge the decision of the Special Master.
>
> 4. The motion of PRWUA and LSRWU was not timely filed. . . .

Opening Brief of BLRID, p.4.

Similarly, Walker's position is that:

> 2. PRWUA's and LSRWU's *Motion* was not timely filed under Rule 13(a), SRBA Rules of Procedure, and should be denied on that basis.
>
> 3. PRWUA is not a "claimant" as defined in I.C. § 42-14O1A(l) and (6) and is not a "party to the adjudication" as defined under SRBA Rules of Procedure 2(q), having not filed any water rights in the SRBA nor asserted ownership of any water rights adjudicated in this subcase; and, therefore, has no standing to challenge the decision of the Special Master.
>
> 4. PRWUA and LSRWU similarly have no standing to challenge the decisions of the Special Master for the same reasons . . . .

Opening Brief of Young Harvey Walker Opposing Challenge, p.4.

In a review of the current AO-1, this Court cannot find a procedure to allow the filing of cross- challenges where, under traditional civil practice (such as filing appeals), a prevailing party who may not wish to directly appeal a decision may file a cross-appeal and raise additional issues on an appeal if some other party does appeal.[1]

This Court agrees with PRWUA and LSRWU that the Special Master simply held in her August 28, 1998, *Order* that she could decide the matter without resorting to associational standing. Also, this issue was not directly raised by any Challenge to this Court. Thus, this Court does not determine the standing issue as to any party other than BLRWUA.

Because this Court decides BLRWUA could properly avail itself of the Docket Sheet procedure (as discussed in the next section of this *Order)* and finding its *Motion to Alter or Amend* was in fact timely, this Court determines that it can very narrowly decide the standing issue of BLRWUA only; and this decision is specifically limited to irrigation districts and the challenging by members of the district of the alleged *ultra vires* acts of the Board of Directors of the district. There are two bases for this decision.

---

[1] The Court may consider amending AO-1 in the future to allow cross-challenges.

First Basis: Members Have No Other Adequate Remedy

In the present case, the objecting party, BLRWUA, is comprised entirely of members of BLRID, all of whom assert water rights as members of BLRID, and all of whom assert injury to this right as a result of the Water Rights Agreement of March 3, 1998, and subsequent ***Special Master's Recommendation***. In the *Reporter's Transcript* of the April 11, 1994, hearing on BLRWUA's *Motion to Participate,* the following is found:

> THE COURT (Judge Hurlbutt): Mr. Hollifield, are all your members, all members of your water users association voting members of the corporation which is the -
>
> MR. HOLLIFIELD: The irrigation district.
>
> THE COURT: -- the irrigation district?MR. HOLLIFIELD: I believe they are, Your Honor.
>
> THE COURT: Are you here to challenge the board of directors for the irrigation district?
>
> MR. HOLLIFIELD: To add support to - not to ask for it, but, yes, to their making the right decision concerning this matter, yes.
>
> THE COURT: Thank you. Mr. Budge, anything further?
>
> MR. BUDGE: Nothing other than to simply comment that the association members, as he's acknowledged, are shareholders in the association, are all members in the district. And they are represented by the district in this particular proceeding. And it appears to be somewhat of an attempt to make an end run around an agreement we have made with the district that perhaps would settle all issues involved in this matter via the petition of Walker's land.
>
> THE COURT: Well, counsel, it will be the ruling of this court that the Big Lost River Water users Association and Mr. Sowards do not have standing to participate or intervene in the matter presently before the court. As voting members and shareholders of the irrigation district, their remedy is through the ballot box when voting for directors, and not to challenge actions taken by the directors in the context of this lawsuit.

> It is akin to a shareholder derivative suit, Mr. Hollifield. And I don't think I can grant you standing to participate in this case. You're welcome to stay in court, though, Mr. Hollifield.

Tr. Pg. 9 ll. 13 to Pg. 10 ll. 23

This Court agrees with Judge Hurlbutt's ruling and adopts and reaffirms it, to the extent that the Board of Directors of BLRID has acted within its powers. When the Board acts within its powers, the district members' remedy is the ballot box. To hold otherwise would allow one or more individual members of an irrigation district, or an association of members of an irrigation district, to improperly challenge lawful acts of a duly elected Board in the SRBA. This would allow members to usurp the powers of the board.

However, under the unique facts and circumstances of this case and due to the potential effect of Partial Decrees entered in this SRBA litigation with a Rule 54(b) Certificate, once the Partial Decree becomes final, it cannot be challenged. Therefore, the alleged *ultra vires* acts of the Board of Directors of BLRID must be considered before the Partial Decree becomes final. Fundamental due process requires that members of an irrigation district must be provided a method in which to challenge claimed *ultra vires* acts of a Board of Directors. This is especially true in the context of the SRBA where the claimed *ultra vires* act of the Board deals with the essential asset and purpose of the irrigation district -- water. A subsequent change in the composition of the Board of Directors, through the ballot box, cannot undo an unlawful transfer of district water which has ripened into a court decreed right for which the time to appeal has expired. To hold otherwise, the will and purpose of the legislation, and the public policy established by its dedication of irrigation water to the lands within the district, could and would be defeated by *ultra vires* acts of the Board of Directors, all to the detriment of those within the district.

This ruling, relative to BLRWUA's standing to file a Challenge, is narrowly limited to the facts and circumstances of theses subcases and because the actions of the Board in relation to the district's water are claimed to be *ultra vires.* For these reasons, this holding is clearly distinguishable from *Fort Hall Water Users Assn. v. U.S.*, 129 Idaho 39, 921 P.2d 739 (1996).

Second Basis: Taking property without due process of law.

In *Yaden v. Gem Irrigation District*, 37 Idaho 300, 216 P. 280 (1923), a case specifically dealing with delivery of dedicated district water to lands outside the district, the Idaho Supreme Court stated:

> To bond the lands of the settlers within the district to acquire the right to the use of water and then to deprive them of such right in order that it may be furnished to lands without the district would clearly be taking property of the land owners within the district without due process of law.

Id. at 309.

Therefore, if the board of directors of an irrigation district enters into an agreement which is *ultra vires*, which results in a taking of members' property without due process of law, the members of the irrigation district would clearly have standing to protect their property rights. While the subject property (water in this case) is held in trust for the members by the district which acts through its board, (I.C. § 43-316), if a board's particular action is *ultra vires*, and therefore both void and a violation of the trust, it has in effect forfeited its lawful right to sit as a board and members would have standing to protect their property rights.

V.

TIMELINESS OF BLRWUA'S MOTION TO ALTER OR AMEND

The ***Special Master's Report and Recommendation, Findings of Fact and Conclusion of Law*** for Water Right 34-00012 was filed March 25, 1998. The April 1998 Docket Sheet was printed by the SRBA clerk's staff on April 6, 1998 and was served by mail the next day, April 7, 1998 (see Clerk's Certificate of Mailing for Monthly Docket Sheet for April 1998 Docket Sheet).

AO-1, Rule 13(a), provides as follows:

13. PROCEEDINGS ON A SPECIAL MASTER'S RECOMMENDATION

a. The Special Master shall prepare and **file** with the court a ***Special Master's Recommendation*** which shall be served on the parties to the subcase and notice of its entry shall be reported in the Docket Sheet. Any party to the adjudication, including parties to the subcase, may file a *Motion to Alter or Amend* within 21 days from the date the ***Special Master's Recommendation*** appears on the Docket Sheet. Any party to the adjudication not already a party to the subcase may respond to a *Motion to Alter or Amend* by filing a *Notice of Participation* which shall set forth the party's name; the water right number; the name, address and telephone number of the attorney; and a short statement of the party's position on the issues presented in *the Motion to Alter or Amend.* **Failure of any party in the adjudication to pursue or participate in a *Motion to Alter or Amend the Special Master's Recommendation* shall constitute a waiver of the right to challenge it before the Presiding Judge.** This waiver shall also apply to further proceedings in the subcase if remanded back to the Special Master. (emphasis added)

As the above-quoted rule states, the ***Recommendation*** "shall be served on the parties to the subcase" and "notice of its entry shall be reported in the Docket Sheet." Because BLRWUA was not a party to the subcase (in fact had been previously ordered that they could not be a party because their interest was being represented by BLRID), BLRWUA was not served with a copy of the ***Recommendation,*** but rather had to rely on the Docket Sheet procedure. Simply stated, a party to the subcase gets direct notice of the ***Recommendation*** in advance of all of the rest of the claimants in the SRBA and the rest of the claimants must await receipt of the Docket Sheet.

The above-quoted rule goes on to provide that "any party to the adjudication . . . may file a *Motion to Alter or Amend* within 21 days from the date the ***Special Master's Recommendation*** appears on the Docket Sheet."

Nowhere is the phrase "from the date the . . . ***Recommendation*** appears on the Docket Sheet" defined. There are essentially two ways to interpret the phrase under the Idaho Rules of Civil Procedure (I.R.C.P.) and the facts of this case. The Docket Sheet was served by mail on April 7, 1998. Therefore, under I.R.C.P. 6(a), the first day to be counted is April 8, 1998. The first way to interpret the above-quoted phrase is that April 8 is day one and April 28 is day 21 (within

21 days), and therefore, a filing date of April 29 is one day late and is time barred. The second way to interpret the above-quoted phrase is by application of I.R.C.P. Rule 6(e)(1) and add three days because service of the Docket Sheet is by mail. A filing of April 29, 1998, would therefore be timely.[2]

This Court concludes for purposes of deciding this case (and until a potential amendment is considered and perhaps implemented) that the more appropriate interpretation of the phrase and operation of the Idaho Rules of Civil Procedure is to allow three (3) days additional time for mailing under I.R.C.P. 6(e)(1).

Support for this conclusion includes the fact that the ***Special Master's Recommendation*** is not a final judgment. Therefore, the time limitations of I.R.C.P. 59(e), construed in *Williamsen Idaho Equip. v. Western Gas & Serv. Co.*, 95 Idaho 652, 516 P.2d 1166 (1973), would not apply.

Also, because of the geography of the state and depending on factors such as where one is located in the state (for the Docket Sheet to reach their local courthouse) and if the day of mailing falls on a Friday, as well as other factors, there can be a variance of several days as to when respective parties may actually get notice.[3]

However, even if this Court is wrong as to when the 21-day period expires, AO-1 13(f) provides:

> The court shall accept the Special Master's findings of fact unless clearly erroneous. [With regard to questions of law] [t]he court may, in whole or in part, adopt, modify, reject, receive further evidence, or remand it with instructions. I.R.C.P. 53(3)(2).

Because this Court rejects the ***Special Master's Recommendation*** for the reasons hereinafter stated, this Court can proceed even without BLRWUA's Challenge, or for that matter, even if BLRWUA lacks standing. However, this Court utilizes the Challenge to frame the issues in considering the ***Special Master's Recommendation.***

---

[2] The Court may consider amending AO-1 Rule 13(a) sometime in the future to clarify this point.

[3] Note that AO-1 6(c) provides the only method for distribution of the Docket Sheet and the Certificate of Service demonstrates this is by mail.

VI.

BLRWUA ISSUE 1

Did the Special Master err in ruling that issues of "fairness" preclude BLRWUA from filing its *Motion to Alter or Amend* when this Court's AO-1, Rule 13(a), allows "[a]ny party to the adjudication not already a party to the subcase" to file such a motion?

The Court sustains this Challenge, holding that issues of "fairness" do not preclude BLRWUA from filing its *Motion to Alter or Amend.* AO-1, Rule 13(a), allows any party to the adjudication not already a party to the subcase to file a *Motion to Alter or Amend.* See also the ruling on Issue 3, which applies to this issue as well.

VII.

BLRWUA ISSUE 2

Did the Special Master err in attributing fault to BLRWUA in delaying the resolution of the case when, in fact, the delay was caused by the Special Master's erroneous ruling dismissing BLRWUA from the case shortly after its *Motion to Alter or Amend* was filed?

Based upon other portions of this Order, the Court sustains this Challenge.

VIII.

BLRWUA ISSUE 3

Did the Special Master err in ruling that the "history" of the subcases at issue was cause to preclude BLRWUA from filing a *Motion to Alter or Amend* which this Court's AO-1 allows it to file?

The Court sustains this Challenge. Again, AO-1, Rule 13(a), does not provide for exclusion to certain parties based upon the "history" of the case. More importantly, the "history" of the subcases supports BLRWUA's *Motion to Alter or Amend.* Specifically, the subsequent change in position of IDWR (which originally recommended denying Walker's and Sunset Trust's claims); the subsequent change in position of the Special Master (who originally ruled on Summary

Judgment that Walker and Sunset Trust could not prevail with the possible exception of estoppel); and the subsequent change in position of BLRID (who had previously tried to defeat the claims and whom Judge Hurlbutt had previously ruled was protecting the interest of BLRWUA).

IX.

BLRWUA ISSUE 4

> Did the Special Master err in dismissing BLRWUA's *Motion to Alter or Amend* without any citation to authority, but only a vague reference to equitable issues such as "fairness," or the "history" of the cases?

The Court sustains this Challenge. AO-1, Rule 13(a), a procedural rule, makes no reference to equitable issues. While the SRBA Court may consider equitable issues, they cannot defeat a claim of an *ultra vires* act by BLRID Board of Directors.

X.
BLRWUA ISSUES 5 AND 6

> Did the Special Master err in granting Walker's and Sunset Trust's *Motion to Dismiss* after she previously ruled that actions taken by the Directors of BLRID were *ultra vires* in granting or delivering water outside the district?
>
> Did the Special Master err in her factual conclusion that is was appropriate to deliver water outside the District?

The Court sustains BLRWUA's Challenge to Issues 5 and 6. They will be discussed jointly.

A: *Ultra vires* Act

The Court begins its analysis of this issue with two long-standing Idaho statutes. The first is I.C. § 43-316, which provides as follows:

> **43-316. Legal title to property.** - The legal title to all property acquired under the provisions of this title shall immediately and by operation of law vest in such irrigation district, and shall be held by such district in trust for, and is hereby

dedicated and set apart to, the uses and purposes set forth in this title. Said board is hereby authorized and empowered to hold, use, acquire, manage, occupy and possess said property as herein provided. [1903, p. 150, § 13; reen. R.C. § 2387; am. 1915, ch. 143 § 3 p. 304; reen. C.L. § 2387; C.S., § 4350; I.C.A. § 42-311.]

The second is I.C. 43 -1001, which provides as follows:

43-1001. Petition for annexation of land. - The holder or holders of any title, or evidence of title, representing any body of lands, may file with the board of directors of an irrigation district a petition in writing praying that said land may be annexed. The petition shall contain a legal description of the lands, the proposed method by which water will be delivered and any other information the district may require, and the petitioners shall state under oath that petitioners hold the title of one-half (½) or more of said lands. [1903, p.150, § 44; am. 1907, p. 484, § 1; am. R.C. & C.L. § 2423; C.S., § 4411; I.C.A., § 42-1001; am. 1990, ch. 340, § 1, p. 923.]

Early and repeated Idaho case law make the necessary points very clearly. First, in *Yaden v. Gem Irrigation District,* 37 Idaho 300, 216 P. 250 (1923), the Idaho Supreme Court held in applicable part as follows:

> Irrigation districts are creatures of the statutes. They are *quasi* public or municipal corporations, and as such have only such power as is given to them by statute, or such as is necessarily implied. *(Evans v. Swendsen,* 34 Idaho 290, 200 Pac. 136; *Kootenai County v. State Board of Equalization,* 31 Idaho 155, 169 Pac. 935; *Olmstead v. Carter,* 34 Idaho 276, 200 Pac. 134; *State v. Deschutes Land Co., 65* Or. 167, 129 Pac. 764.)
>
> Under the provisions of C. S., sec. 4350, the legal title to all property acquired by the district by operation of law vests immediately in the district and held in trust for, dedicated to and set part to the use and purposes provided by law. Under the provisions of C. S., secs. 4346 and 4355, **the power of the directors or other officers of an irrigation district is limited and any act done in excess of the express or implied provisions of the statute by such directors or other officers is *ultra vires.* However, the foregoing provisions of the statutes do not prohibit the delivery of water to users outside of the district when the same is not needed by users within the district.** Such delivery of water would not be a dedication under the provision of the constitution or the statutes heretofore referred to. (Const., art. 15, secs. 1 and 4; C. S., secs. 5638 and 5556.) The land owners within the district are obligated to the extent of the cost of maintenance of the system and for the payment of the same. The appropriation and diversion of waters by the district, through its officers, or the purchase of a system constructed in whole

or in part by its funds, becomes the property of the district and is held in trust for the land owners within it and no burden can be imposed upon it for the delivery of maintenance of canals or laterals for the delivery of water beyond the boundaries of the district, and **no contract made by the directors of a district to deliver water beyond its boundaries is a liability for which the district can be held.** The ultimate purpose of a district's organization, under the provisions of the statutes of this state, is the improvement, by irrigation, of lands within the district. The purpose of its organization is not rental, sale or distribution of water. It is authorized to acquire the right to the use of water for the purpose of delivery to settlers within the district. To bond the lands of the settlers within the district to acquire the right to the use of water and then to deprive them of such right in order that it may be furnished to lands without the district would clearly be taking property of the land owners within the district without due process of law. *(Jenison v. Redfield,* 149 Cal. 500, 87 Pac. 63; *Merchants' Nat. Bank of San Diego v. Escondido Irr. Dist.,* 144 Cal. 329, 77 Pac. 937.)

. . . .

There is no merit in this contention. The waters were originally appropriated and the system constructed to apply water to land owners within the boundaries of the district and **all persons dealing with the directors or officers of the district are bound to take notice of the various enactments conferring authority upon the directors or officers of the district and the limitation of their powers. The delivery of water by the directors or officers of an irrigation district to exterior lands would simply be an act *ultra vires,* except** in such cases where the district acquired the system burdened with the duty to deliver water without its boundaries, or **in case of surplus of water.**

Officers of an irrigation district are public officers and a contract made with a public officer in excess of the provisions of the statute authorizing the contract is void, so far as it departs from or exceeds the terms of the law. *(State v. Deschutes Land Co.,* 64 Or. 167, 129 Pac. 764.)

C.S., secs. 4411 to 4421, inclusive, provide the only method by which owners of lands lying outside of the boundaries of an irrigation district may become entitled to the use of waters or acquire an interest in the system of the district, and that is by annexation. (Emphasis in bold is mine).

Next in line is *Jensen v. Boise-Kuna Irr. Dist.,* 75 Idaho 133, 269 P.2d 755 (1954), wherein the Idaho Supreme Court again affirmed *Yaden* as good law, but, importantly, also stated in applicable part as follows:

The incorporation, by reference, of powers of the district applicable to irrigation, includes the general powers set forth in § 43-304, I.C., which specifically includes the power to "make and execute all necessary contracts". From these provisions it is clear that the subject matter of the contracts which the district made with the plaintiffs is not *ultra vires*. The contracts by their terms identify the water to be made available to the plaintiffs as "seepage waters and waste waters." **Hence, no attempt was made by the directors to obligate the district to deliver or make available to the plaintiffs any of the water or water rights owned by the district, and available, appurtenant and dedicated to lands within the district.**

. . . .

As held by this court, and as expressly provided by § 43-316, I.C., **the title to all property acquired by an irrigation district, including its water rights, is vested in the district and held by the district in trust for, and dedicated and set apart to, the uses and purposes set forth in the law**. *Yaden v. Gem Irr. Dist.*, 37 Idaho 300, 216 P. 250; *Colburn v. Wilson,* 23 Idaho 337, 130 P. 381.

It follows that any water owned by the district and thus dedicated to the irrigation of lands within the district, cannot be supplied to lands outside the district so long as it is needed for the proper irrigation of lands within the district. The officers of the district have no power to contract for the delivery or supplying of such water for use outside the district. **Any contract attempting to create or impose an obligation on the district to supply or make available any such water for any such purpose is *ultra vires* and void. It also follows that any attempt by the directors of the district to create such an obligation cannot be made the basis of estoppel against the district**. Otherwise, the will and purpose of the legislature, and the public policy established by its dedication of such water to the lands within the district, could be defeated by ill-advised contracts of the directors. The court was, therefore, in error in holding that the defendant is estopped to deny that the water to be made available to the plaintiffs was all surplus and waste and not needed by, or available to, the district for irrigation of any of the lands therein.

. . . .

Supporting our conclusion that a contract, which would obligate an irrigation district to deliver any dedicated water for use outside the district is *ultra vires* and void, and that estoppel cannot be invoked in aid of such a contract, are the following authorities: *Jenison v. Redfield,* 149 Cal. 500, 87 P. 62; *Maclay v. Missoula Irr. Dist., 90* Mont. 344, 3 P.2d 286; *Koch v. Colvin, 110* Mont. 594, 105 P.2d *334; School Dist. No. 8 in Twin Falls County v. Twin Falls, etc., Ins. Co.*, 30 Idaho 400, 164 P. 1174; *Deer Creek Highway Dist. v. Doumecq*

Highway Dist., 37 Idaho 601, 218 P. 371; *Lloyd Crystal Post No. 20, The American Legion v. Jefferson County*, 72 Idaho 158, 237 P.2d 348; *Worlton v. Davis*, 73 Idaho 217, 249 P.2d 810; *State v. Northwest Magnesite Co.*, 28 Wash.2d 1, 182 P.2d 643; 31 C.J.S., Estoppel, § 141. (Emphasis is mine).

Perhaps the most important case of all to the resolution of the present subcases, however, is *Jones v. Big Lost River Irrigation District*, 93 Idaho 227, 459 P.2d 1009 (1969).

This case is important not only because it again affirms all of the law previously discussed above in this section, but because:

Jones deals with:

1. The same irrigation district as the present case (BLRID);

2. The same canal as the present case (the Arco Canal);

3. Walker and/or his predecessors were involved in the claims of Jones; and

4. Jones was attempting to do the very thing Walker now claims that he has a right to do, that is, to use stored water of the irrigation district for the irrigation of lands outside the district.

Jones holds that:

1. BLRID had no duty or obligation to deliver storage water outside the boundaries of the district and, pursuant to *Yaden* could not have done so;

2. The waters owned by an irrigation district must be used within the irrigation district itself and cannot be used outside the district (excepting surplus waters not needed or seepage and waste water not available for irrigation of district lands);

3. The only method that owners of land lying outside of the boundaries of an irrigation district may be entitled to use non-surplus waters or to acquire an interest in the district's water is by annexation to the district itself; and

4. Any agreement, contract or action of the officers of the irrigation district contrary would be an *ultra vires* act and is therefore void.

Therefore, this Court holds that to the extent the Water Rights Agreement entered into between Walker and BLRID relates to or covers non-surplus irrigation water belonging to BLRID, held in

trust for lands within the district, is to be granted to Walker, or delivered to Walker (or others), for use on lands outside the district, it is *ultra vires*, and void. More specifically, the *Standard Form 5*, entered into by the parties to the subcase, putting the lands of Walker, Jensen and Sunset Trust lying outside of BLRID within the place of use of the water rights owned by BLRID is void. Void also is the contractual provision that BLRID shall "continue permanently the delivery" of water to Walker's land outside BLRID boundaries, to the extent it is the delivery of district water which is not surplus.

Walker, Jensen and Sunset Trust have a direct legal option; the annexation statute, for their lands which are outside the boundaries of the district. Allowing BLRID and Walker, Jensen and Sunset Trust to enter into a contract, agreeing to change the place of use element of a water right of BLRID for delivery of dedicated district water outside the boundaries of the district, is a "back door" attempt to avoid public policy, relevant statutes including annexation, and long-established case law of this state. It also represents, in effect, an impermissible collateral attack on the Supreme Court decision in *Jones v. Big Lost River Irrigation District, supra*, decided in 1969, specifically relating to this very canal, and lands outside the district boundary of BLRID, wherein the Supreme Court stated BLRID could not lawfully deliver needed dedicated water outside its boundaries. Simply stated, these parties cannot, by entering into a contract, change what is in fact a dog into a cat.

The scope of this decision covers only BLRID water and not Walker's (or others with lands outside the boundary of the district) previously owned water for his Butte City Place which is apparently delivered to the boundaries of the district under a transportation agreement with BLRID. Obviously, and consistent with *Jensen v. Boise-Kuna Irr. Dist., supra*, BLRID has the lawful authority to enter into contracts with Walker, Jensen, Sunset Trust, and others, relative to their lands outside the boundaries of the district, **if the subject matter of the contract is lawful;** i.e., the district could enter into a contract with the owner of lands outside the district for delivery of surplus, unneeded district water, if any exists.

This court wants to be extremely clear that by its ruling under the specifics of this case it is not trying to discourage settlement of disputed claims in the SRBA litigation. To the contrary,

this Court does encourage settlements, so long as the contract for the settlement is not *ultra vires* and void, or is for some other reason, illegal.

B: Estoppel Is Not Available to Walker, Jensen, or Sunset Trust

The Court holds that as to non-surplus dedicated district water, estoppel is not available to Walker, Jensen, or Sunset Trust for the following reasons.

As noted in *Yaden, supra,*:

> All persons dealing with the directors or officers of the district are bound to take notice of the various enactments conferring authority upon the directors or officers of the district and the limitation of their powers.

37 Idaho at 310.

Stated another way, Walker, Jensen, and Sunset Trust are bound to know they had no legal right to receive dedicated district water from the district (based upon the statutes and case law discussed above) for use on lands outside district boundaries. As such, they can acquire no legal right based upon a breach of trust of which they had notice. This would be particularly true in this case, because of *Jones v. BLRID,* supra, decided in 1969, dealing with this very irrigation district, the Arco Canal, and district storage water.

Also, based upon *Jensen v. Boise-Kuna Irr. Dist.*, and as quoted at length above, the Idaho Supreme Court held:

> It follows that any water owned by the district and thus dedicated to the irrigation of lands within the district, cannot be supplied to lands outside the district so long as it is needed for the proper irrigation of lands within the district. The officers of the district have no power to contract for the delivery of supplying of such water for use outside the district. Any contract attempting to create or impose an obligation on the district to supply or make available any such water for any such purpose is *ultra vires and* void. **It also follows that any attempt by the directors of the district to create such an obligation cannot be made the basis of estoppel against the district**. Otherwise, the will and purpose of the legislature, and the public policy established by its dedication of such water to the lands within the district, could be defeated by ill-advised contracts of the directors.

75 Idaho at 141,142 (emphasis added).

Under the facts of this case, the Board of Directors originally took the correct position that it could not deliver dedicated district water outside the boundaries of the district. By simply changing the members on its Board of Directors, the district cannot change the law and enter into an illegal contract.

More importantly, however, the issue is not just between the current Board of Directors and the claimants outside the boundaries of the district. Members of BLRID inside the boundaries of the district are injured by the subject matter of the contract; the directors themselves, in their capacity as directors, are not injured. As *Yaden* provides, this would be a taking of members' property without due process of law.

Further, any claimed yearly payment for the water by Walker and others does not alter the result for two reasons. First, to the extent water users outside the boundaries of the district paid the district and received surplus water, this could not form the basis for estoppel, as this would be a legal contract. In other words, reliance on a lawful contract (years wherein surplus water users delivered) cannot form the basis of estoppel to compel an illegal contract for water delivery in short water years. *Jones v. BLRID*, 93 Idaho at 230.

Second, as demonstrated in *Yaden,* supra, for a number of years Yaden had paid the district assessments for delivery of district water outside the boundaries of the district, yet this practice did not require the district to continue delivering water outside its boundaries.

Estoppel is equitable in nature and one who seeks equity, must have "clean hands." Water users outside the boundaries of the district, receiving the benefit of illegal acts by the district,[4] would not be entitled to the status of having "clean hands," particularly when compared to users within the district who are harmed by the conduct. As stated in *Johnson v. Strong Arm Reservoir Irrigation District,* 82 Idaho 478, 356 P.2d 67 (1960), "equity will not raise its hand against those who acted innocently and in good faith." In light of *Jones v. BLRID,* supra, Walker, Jensen and

[4] This Court does not decide the issue of whether BLRID in fact acted unlawfully in the past, i.e. whether the Board of Directors as a whole authorized delivery of needed district storage water.

Sunset Trust, cannot as a matter of the law be acting innocently and in good faith. The Idaho Supreme Court directly stated the desired conduct is illegal, and they are charged with notice.

Walker, Jensen, Sunset Trust and other desirous users outside of the district have a direct, statutory option. That option or recourse is annexation of their lands into the district under I.C. 43-1001 et. seq. The Idaho Supreme Court has consistently held that this is the sole method to get dedicated, non-surplus district water on lands outside the boundaries of the district.[5], The Supreme Court has consistently rejected estoppel or estoppel by laches as such a method. The one exception is *Johnson v. Strong Arm Reservoir Irrigation District,* 82 Idaho 478, 356 P.2d 67 (1960), holding in essence that the "district" never conducted its business in accordance with Idaho laws pertaining to irrigation districts, as such was a district in name only, and that it characteristically operated as a mutual canal company. *Hillcrest Irr. Dist. v. Nampa. Irr. Dist.,* 57 Idaho 403, 66 P.2d 115 (1937), is also clearly distinguishable.

XI.

BLRWUA'S ISSUE 7

> Did the Special Master's decision dismissing BLRWUA from this proceeding in March 1998 prejudice the rights of the Association, by allowing members of the irrigation district to control issues related to the Association without appropriate representation of the Association's interests?

This Court, having addressed the standing issue above, this issue will not be discussed further, with one exception. As shown by the *Reporter's Transcript* of a hearing held at the SRBA on Tuesday, April 11, 1994 (and referenced in the *Reporter's Transcript* of June 12, 1998, hearing on BLRWUA's challenge to Order Granting PRWUA's and LSRWU's *Motion to Alter or Amend*; Amended Order Granting Walker's Motion to Dismiss; and Denying BLRWUA's Motion to Alter or Amend entered by Special Master Bilyeu, p. 35 ll. 9 to p. 36 ll. 12), BLRWUA had filed a

---

[5] According to BLRID's *Brief in Opposition to Summary Judgment*, lodged April 25, 1997, (when represented by attorney Ling) Walker previously attempted to have his Butte City lands annexed to BLRID, which Annexation Petition failed. See *Brief in Opposition* at 13.

motion to participate. As stated earlier, Judge Hurlbutt ruled that BLRWUA did not have standing to participate or intervene as BLRID Board of Directors was participating; that as voting members of the district and shareholders of the irrigation district, their remedy was through the ballot box when voting for directors, and not in challenging lawful actions taken by the directors. See Transcript of Young Harvey Walker's Motion for Preliminary Injunction and Writ of Mandate; BLRWUA's Motion to Participate, April 11, 1999, page 10, ll. 11-23.

Again, this Court would agree with Judge Hurlbutt's ruling, and concur in the same, to the extent the Board of Directors is acting within the bounds of the law. However, to the extent the Board of Directors conduct is *ultra vires,* this Court rules the members can challenge the conduct in SRBA related issues; otherwise they would have no meaningful remedy.

XII

BLRWUA'S ISSUE 8

Did the Special Master's decision dismissing BLRWUA from the proceeding, which she later reversed on August 28, 1998, prejudice the Association by not allowing the Association to participate as allowed and contemplated by AO-1, Rule 13(a), of this Court's Administrative Order?

Discussion of this issue is not necessary to the resolution of this Challenge.

XIII.

PARTIAL DECREES TO BE ENTERED

Based upon the foregoing, Special Master Bilyeu's ***Recommendation*** and the *Standard Form 5* are rejected. The Court affirms the Special Master's Order on Summary Judgment with the one exception of estoppel, which does not apply in this case. In accordance with the original

recommendation of IDWR, the water rights in subcases 34-00012, 34-00013, 34-02507, and 34-10873 are decreed in the name of BLRID without including in the place of use element the lands of Walker, Sunset Trust, or Jensen which lands are outside the district.

IT IS SO ORDERED.

DATED April 27, 1999.

BARRY WOOD
Administrative District Judge
Presiding Judge of the
Snake River Basin Adjudication